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CASE STUDY 3: MOVEMENT LAWYERS AND COMMUNITY ORGANIZERS IN LITIGATION: ISSUES OF FINANCES AND COLLABORATION

*Paul R. Tremblay**

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At the Movement Lawyering Ethics Roundtable organized by the Monroe H. Freedman Institute for the Study of Legal Ethics at Hofstra University's Maurice A. Deane School of Law, our assignment involved three ethics issues arising from the collaborative litigation relationship of movement lawyers and their organizer clients. We offer here three stories developing those issues and our assessments of the tensions involved.

I. ISSUE #1: FUNDRAISING (INCLUDING LITIGATION FINANCING)

Your organization, the Community Justice Foundation ("CJF"), is a multidisciplinary social justice nonprofit with considerable cash reserves. CJF works with a nonprofit refugee organization, MigrantsCA, Inc., that seeks to secure rights for refugees, especially those who were unlawfully turned away by Immigration and Customs Enforcement ("ICE") agents at the border. MigrantsCA engages in a wide range of activities to organize and educate communities about conditions faced by Salvadorans, Guatemalans, and Hondurans.

CJF has worked with MigrantsCA on its organizing campaigns, advising it about various legal issues. CJF also works with MigrantsCA on litigation. Many refugees have been unlawfully turned away by ICE at the U.S. Border with Mexico. CJF has filed a class action on behalf of

* Clinical Professor and Dean's Distinguished Scholar, Boston College Law School. I thank the participants at the Movement Lawyering Ethics Roundtable, hosted by the Monroe H. Freedman Institute for the Study of Legal Ethics at Hofstra University's Maurice A. Deane School of Law, and especially Ellen Yaroshefsky, for the rich and productive discussion of these timely ethics questions. I also thank Brandon Sloane for helpful research assistance and Dean Vincent Rougeau and Boston College Law School for financial support.

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MigrantsCA, along with individual plaintiffs whom MigrantsCA has arranged to join the lawsuit. MigrantsCA has spent significant sums from its limited budget to help the plaintiffs and has provided the plaintiffs with housing, transportation, and food.

CJF lawyers and legal workers have traveled back and forth between the United States and Mexico and cannot adequately represent the plaintiffs unless they have access to them in Mexico. The plaintiffs were initially housed in a shelter at the Mexican border, but now have been forced to leave the shelter. MigrantsCA has tried to raise sufficient funds to provide the plaintiffs with housing, food, transportation, and spending money, but thus far it has had limited success.

The CJF lawyers have posed the following questions arising from this scenario:

- 1. How might CJF assist the plaintiffs? The CJF lawyers believe that concrete financial support should be possible. If so, how, and under what circumstances?*
- 2. MigrantsCA needs money to hire a development director for fundraising. Might CJF help?*
- 3. Are there any ethical considerations that arise when CJF applies to grant funders to support its work with MigrantsCA? CJF knows that funders are more likely to provide money to lawyers for litigation efforts, but litigation is only one part of MigrantsCA's broader strategy. MigrantsCA needs money as much for its community organizing as for its litigation efforts.*

Ethical and Strategic Assessment of Issue #1

All three of the posed questions relating to Issue #1 might be distilled into one overarching consideration: may a tax-exempt nonprofit law firm provide its client with financial assistance to help the client achieve its goals? That topic implicates some direct legal ethics worries (ones that would apply whether the law firm was a conventional privately-owned entity or a nonprofit), and some tax-exempt organization worries (applicable only to public interest organizations like CJF). Let us address the considerations separately.

A. Lawyers Providing Assistance to Clients

A lawyer may provide financial assistance to a client at any time, unless (a) the assistance is prohibited¹ by Rule 1.8(e) of the American

1. The analysis here will address duties of and restrictions on lawyers arising from the professional conduct rules of the jurisdiction in which the lawyer is licensed. For ease of discussion, we will refer to the American Bar Association's Model Rules of Professional Conduct, which serve

Bar Association's Model Rules of Professional Conduct,² or (b) the financing triggers an impermissible conflict of interest.³ The question posed here is whether CJF encounters either of those bans.

1. Model Rule 1.8(e) Considerations

Model Rule of Professional Conduct 1.8(e), a version of which has been adopted by most states, provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.⁴

Rule 1.8(e) might strike many as an absurd restriction on a lawyer's generosity,⁵ but it has been adopted by most states with the language just described.⁶ It is—perhaps to some surprise—enforced by the bar regulatory authorities. Lawyers have been disciplined for giving or lending money to indigent clients.⁷ Therefore, if CJF were a conventional law firm, it could not provide assistance to its client MigrantsCA, or to the individual plaintiffs, unless that assistance qualified as permissible under the rule.

Let us then apply the rule to the MigrantsCA example. There is little doubt that, as described, some of the proposed assistance would be “in connection with pending or contemplated litigation.”⁸ CJF represents

generally as the basis for lawyer regulation in every state (including California, which began to follow the Model Rules format on November 1, 2018). See *Rules of Professional Conduct*, ST. B. CAL., (2018) <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct>. No jurisdiction has adopted the ABA Model Rules verbatim, however, so lawyers in practice must attend to their home jurisdiction's provisions to assess the propriety of any action they intend to take.

2. MODEL RULES OF PROF'L CONDUCT r. 1.8(a) (AM. BAR ASS'N 2018).

3. *Id.* r. 1.7.

4. *Id.* r. 1.8(e).

5. See, e.g., Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 44-45 (2015) (making that argument).

6. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT r. 1.8(a) (8th ed. 2016).

7. See, e.g., *In re Ralston*, 794 S.E.2d 646, 647-48 (Ga. 2016) (holding to publicly reprimand a lawyer for advancing funds to cover rent and prescription medication; bar counsel sought a suspension); *Att'y Grievance Comm'n. v. Kandel*, 563 A.2d 387, 388-89, 391 (Md. 1989) (holding to publicly reprimand a lawyer who provided funds for his client's car repairs; dissenting justice recommended suspension. *Id.* at 391 (Rodowsky, J. dissenting)); see also Schrag, *supra* note 5, at 58-62 (cataloguing cases regarding violations of this rule).

8. MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 2018).

MigrantsCA and other plaintiffs in a litigated class action, and the plaintiffs need funds for “housing, food, transportation, and spending money.” None of that, except possibly transportation (if for purposes of the lawsuit, such as planning meetings, depositions, or court appearances), would qualify as “expenses of litigation” which the rule allows.⁹ Therefore, using conventional legal ethics analysis, CJF’s lawyers could not share some of CJF’s funds with the plaintiffs to help them pay their bills.

Before considering the funding for the development director, we might address one possible work-around for CJF if it searched for a strategy to support the indigent plaintiffs assisted by MigrantsCA. Imagine the following scenario: In the class action filed by CJF on behalf of the immigrants, MigrantsCA is *not a named plaintiff*. Instead, selected individual members of the class who have suffered injuries serve as the named plaintiffs, as is customary with class action litigation.¹⁰ With this adjustment of the facts, MigrantsCA is a client of CJF, but not for purposes of the litigation. The trigger of Rule 1.8(e), that is, “financial assistance to a client in connection with pending or contemplated litigation,” will be absent.¹¹ That strategy eliminates Rule 1.8(e) as a ban on the proposed donation. If CJF provides funds to the MigrantsCA organization for its own use, MigrantsCA may use the funds as it sees fit, including to provide food, housing, and other aid to the plaintiffs.

Rule 1.8(e) does not apply to transactional lawyers. It only applies to litigators.¹² If CJF were to separate out its litigation activity from its other, more transactional lawyering activity on behalf of MigrantsCA, its donations to MigrantsCA would pass muster under Rule 1.8(e).¹³

9. See *Kandel*, 563 A.2d at 389-90 (rejecting the lawyer’s argument that the client’s car repairs related to the personal injury action for which the lawyer provided legal services).

10. In class action proceedings, the named plaintiff serves as a proxy or representative for the collective harmed group. See, e.g., *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1592-1604 (1976) (describing the class lawyer’s duty to the class more than to any named plaintiff).

11. MODEL RULES OF PROF’L CONDUCT r. 1.8(e).

12. See Alex Petrossian, Note, *Finally Some Improvement, But Will It Accomplish Anything? An Analysis of Whether the Charitable Bail Bonds Bill Can Survive the Ethical Challenges Headed Its Way*, 40 FORDHAM URB. L.J. 2013, 2051 (2013) (“[I]t seems clear that attorneys do not violate 1.8(e) by working with a charitable organization that posts bail for its clients.”); Schrag, *supra* note 5, at 44.

13. It is true that Model Rule 8.4(a) declares it misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another . . .” MODEL RULES OF PROF’L CONDUCT r. 8.4(a) (AM. BAR ASS’N 2018). CJF must assess whether the strategy described in the text qualifies as the firm’s circumvention of Rule 1.8(e) by use of a proxy. The opinion here is that Rule 8.4(a) does not fit in this scenario. The suggested strategy leaves CJF with some unaided clients whom it represents in litigation and another client, MigrantsCA, which it presents in other

There is one important risk inherent in the strategy just described. If CJF does not represent MigrantsCA on any matter other than to litigate this class action, and if the lawyers and MigrantsCA include the individual immigrant refugees as named plaintiffs, CJF encounters a Rule 8.4(a) challenge. That rule prohibits a lawyer from violating a professional conduct rule, directly or “through the acts of another.”¹⁴ If it is true that CJF cannot expressly fund the housing needs of its named plaintiffs, which we agree would be forbidden, it cannot accomplish the same result by giving the money to another client (or even a non-client) who will supply the funds to the plaintiffs.¹⁵ Therefore, the earlier-described strategy, where CJF assists MigrantsCA with nonlitigation, but fungible, financial assistance appears to succeed if and only if CJF has a separate representational relationship with MigrantsCA.

Next, we must consider whether the *other* support CJF considers, that is, funding for a new development director, would also trigger Rule 1.8(e), even if MigrantsCA remains a plaintiff. Our assessment is that it does not. Rule 1.8(e) prohibits assistance “in connection with pending or contemplated litigation.”¹⁶ While MigrantsCA may be a litigation client of CJF, its need for a development director is a more global need that would exist separate from the ongoing litigation. It would call for a crabbed, distorted reading of Rule 1.8(e) to conclude that a lawyer representing a multiservice grassroots organization in some litigation cannot donate funds for that organization’s ongoing needs. No reported disciplinary decision has sanctioned a lawyer for donating to a nonprofit client while also representing the client,¹⁷ and our conclusion is that no such discipline would be warranted.

matters. What MigrantsCA does with the donations it receives from CJF is entirely up to MigrantsCA. In that same vein, the proposed arrangement does not appear to implicate Rule 1.8(a), governing business transactions between a lawyer and her client. *Cf.* Petrossian, *supra* note 12, at 2051-52 (describing a lawyer-supported bail bond arrangement as likely triggering Rule 1.8(a)). CJF is not arranging for a financial assistance program for its clients; it is allowing MigrantsCA to increase its resources, some of which will filter down to CJF’s clients. If CJF does not otherwise represent MigrantsCA on other matters, this concern has more weight, which the proceeding text explains.

14. MODEL RULES OF PROF’L CONDUCT r. 8.4(a).

15. *See* NYSBA Comm. on Prof’l Ethics, Op. 1145 (2018) (providing financing through a litigation funder violates Rule 1.8(e) through the use of the intermediary); Schrag, *supra* note 5, at 63-64 (noting that a lawyer may not circumvent Rule 1.8(e) by using an intermediary).

16. MODEL RULES OF PROF’L CONDUCT r. 1.8(e).

17. Our research shows that every reported discipline based upon a violation of Rule 1.8(e) involved an individual client. *See, e.g.,* Schrag, *supra* note 5, at 44-45 (canvassing the cases). Our separate research efforts have uncovered no examples of discipline based on Rule 1.8(e) where the client was an organization.

Finally, let us address one further permutation of the litigation financing puzzle involving Rule 1.8(e). Imagine the following variation of the MigrantsCA and CJF story:

CJF has solicited the pro bono services of Durkin Gibson LLP, a multinational law firm with a commitment to public service, to serve as co-counsel with CJF on the litigation involving MigrantsCA. Durkin Gibson has been a loyal supporter of CJF, including providing regular end-of-year donations to CJF in response to the nonprofit's annual fundraising campaign. May CJF donate some or all of the Durkin Gibson funds to MigrantsCA to assist with the latter's community organizing efforts?

Whether that use of the Durkin Gibson money is proper depends, in our opinion, on the *intent* of Durkin Gibson. If the law firm's charitable strategy were to support MigrantsCA with non-litigation financial help while it represented the client in litigation, it would be forbidden to do so by Rule 1.8(e), as we have seen above.¹⁸ Durkin Gibson may not avoid the Rule 1.8(e) prohibition by using CJF as a conduit. In other words, the law firm could not hatch a plan where, instead of providing the forbidden direct financial support to MigrantsCA, it sought to funnel that support through CJF as a conduit. Doing so plainly appears to be in violation of Rule 8.4(a), which as we saw above prohibits a rule violation through the actions of another.¹⁹

But if, instead, Durkin Gibson's donation was meant to support the full portfolio of work performed by CJF, then the donation to MigrantsCA would be entirely proper, it seems to us, so long as CJF could lawfully donate any of its money to MigrantsCA. CJF's funding is of course fungible, and while the dollars donated by CJF to MigrantsCA might be the same dollars donated to CJF by Durkin Gibson, it is difficult to imagine that a disciplinary authority would conclude that those dollars represent the law firm's improper Rule 1.8(e) support to its client.²⁰ Intent matters in attorney discipline circles,²¹ so the absence of a

18. See *supra* notes 14-17 and accompanying text.

19. See *id.*

20. Several bar association ethics opinions have addressed the fungibility of money in concluding that certain uses of attorney's fee dollars do not violate the rule against fee-splitting with nonlawyers. See, e.g., Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2007-172 (2007) (noting that lawyers may properly accept payments of fees by credit card, including the service fees, notwithstanding a literal violation of California fee-splitting rule); Oregon Bd. of Governors, Formal Op. 2005-133 (2005, revised 2014) (noting that a credit arrangement to pay lawyers' fees in return for ten percent financing charge does not violate the fee-splitting rule); see also Phila. Bar Ass'n Prof. Guid. Comm., Informal Op. 2003-15 (2003) (illustrating that a law firm may take out non-recourse loan from funding company to cover litigation costs); Ill. Bd. of Governors Comm., Op. 92-9 (1993) (same).

21. See Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J.

plan to use CJF as a conduit to send funds to MigrantsCA would very likely preclude any disciplinary worries.

There is yet one other potential strategy that would, we conclude, justify Durkin Gibson's direct payment to MigrantsCA even while the law firm represented the client in litigation. If MigrantsCA were a tax-exempt Section 501(c)(3) nonprofit eligible to receive tax-deductible donations from the general public,²² Durkin Gibson should be able to make such a tax deductible donation to the nonprofit even if the funds were likely to be used other than for litigation expenses. Here's why: Imagine that an attorney regularly sent a donation each year on December 31st to her favorite charity, year after year. If that attorney in one of those years happens to offer her pro bono legal services to assist the charity to resolve a litigation dispute, it would defy all logic to suggest that she would therefore be forbidden from sending her annual donation to the charity, until the litigation relationship ended. Her best (and correct) argument would be that the charitable donation is not "in connection" with the litigation, and therefore Rule 1.8(e) has no applicability.²³

If that thought experiment works, then the same analysis would apply to Durkin Gibson's donation to the charity MigrantsCA. There is nothing magic about the thought experiment's including a history of payments. That fact appeared only as a rhetorical device. A donation to a tax-exempt 501(c)(3) organization should not fall within the ambit of Rule 1.8(e).

2. Non-Rule 1.8(e) Considerations

Even if Rule 1.8(e) does not apply, the inquiry does not end. It is possible that CJF's financing the work of MigrantsCA, either by assisting its constituents with funding for their necessities of living or supporting the hire of a new development director, might implicate some conflict of interest worries. Our conclusion is that, as applied to the

LEGAL ETHICS 1, 12-15 (2010) (arguing that the disciplinary rules should not be seen as strict liability provisions); Matthew A. Smith, Note, *Advice and Complicity*, 60 DUKE L.J. 499, 529-30 (2010) (noting that a lawyer's intent matters when advising clients about crimes or frauds).

22. See I.R.C. § 501(c)(3) (2015) (granting tax-exempt status to certain types of community or charitable organizations). The argument we propose in the text might be just as viable for any community-based organization that relies on support from donors and friends, even if the support does not qualify for a tax deduction. But its persuasive power is more apparent when we imagine MigrantsCA as a Section 501(c)(3) tax exempt organization.

23. See MODEL RULES OF PROF'L CONDUCT r. 1.8(e); see also *supra* notes 4-22 and accompanying text.

example described above, few if any conflict concerns arise, but the facts of any concrete narrative might lead to a different result.

Rule 1.7(a)(2) states that “a lawyer shall not represent a client if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”²⁴ An accompanying provision, Rule 1.2(a), declares that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”²⁵ The upshot of these two rules is that CJF must respect its client’s goals and preferences and not distort the representation by its own needs or commitments.²⁶ If CJF’s funding of MigrantsCA were, as a direct result of that action, to influence the advice or strategies CJF offers to its client, that would represent a conflict of interest that would require MigrantsCA’s informed consent.²⁷

If CJF’s financial support to MigrantsCA would alter or distort the nature of the representation it offered to its client, that effect would need to be addressed, and it might prohibit either the financial support or the representation. Nothing in the example offered here even hints of such distortion or influence. Therefore, if not prohibited by Rule 1.8(e), the assistance would be acceptable and would not subject the lawyers involved to discipline.²⁸ We do note, though, that a grassroots advocacy organization like MigrantsCA has every right, should its membership discern it to be useful for the organization’s mission, to accept direction from a prominent and thoughtful legal services organization or its lawyers.²⁹ This topic arises in Issue #3 below.³⁰

24. MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2) (AM. BAR ASS’N 2018).

25. *Id.* r. 1.2(a).

26. *See id.* r. 1.8(f) (permitting third parties to pay for a client’s lawyer’s time, so long as that third party funder does not interfere with the lawyer’s independent professional judgment).

27. *See id.* r. 1.7(b) (permitting consent to certain conflicts under certain identified conditions).

28. If CJF were to fund MigrantsCA impermissibly, the individual lawyers representing MigrantsCA would likely face discipline. Except in rare circumstances, law firms are not subject to discipline. *See* Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, 2016 U. ILL. L. REV. 445, 467 (2016) (“[A]s a rule, law firms are not subject to discipline.”); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 4 (1991). Instead, the lawyers involved would be subject to discipline.

29. The role tensions of lawyers representing community groups, including the proper participatory role of the lawyers in group decision-making, have been explored elsewhere. *See, e.g.*, Michael Diamond & Aaron O’Toole, *Leaders, Followers, and Free Riders: The Community Lawyer’s Dilemma when Representing Non-Democratic Client Organizations*, 31 FORDHAM URB. L.J. 481, 486-87 (2004); Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2141 (2007). *See generally* Stephen

B. Nonprofit Organizations Providing Assistance to Clients

There is a separate perspective that warrants exploration on the question about CJF supporting MigrantsCA. CJF is not a conventional law firm. It is an IRC Section 501(c)(3) nonprofit organization whose mission includes advocacy, community organizing, education, and provision of legal services. Rule 1.8(e) applies to lawyers and therefore to a law firm populated by lawyers.³¹ The consideration to be examined here is whether CJF, given its multiple missions, may support MigrantsCA financially, even in the midst of active litigation on its behalf, using funds other than those intended for the legal representation.

The answer to that question must be yes. Let us examine the proposition carefully. We first recognize the uncontroversial fact that an organization not operated for profit may provide an array of services to its constituents, including legal services.³² If such an organization, for example, provided rent support or housing assistance to the same family it represented in litigation,³³ no bar counsel's office would seek to discipline the nonprofit's lawyers using Rule 1.8(e) because their larger organization provided help with the client's shelter. Indeed, it would strain credulity to claim that *the lawyer* was providing the assistance just because the multiservice agency delivered the support to the lawyer's client. To no surprise, no reported discipline case exists showing such an attack on the nonprofit's lawyers.³⁴

Therefore, if CJF as an organization separated out its allocation of its charitable resources and provided explicit funding to MigrantsCA as a supportive, general-revenue donation, during a time when CJF lawyers represented in the class action lawsuit both MigrantsCA and the

Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (2002); Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389 (2010).

30. See *infra* Part III.

31. See MODEL RULES OF PROF'L CONDUCT r. 1.8.

32. See *N.A.A.C.P. v. Button*, 371 U.S. 415, 428-29 (1963) (recognizing the First Amendment right of nonprofit corporations to provide legal services); Kermit J. Lind, *Can Public Nuisance Law Protect Your Neighborhood from Big Banks?*, 44 SUFFOLK U. L. REV. 89, 103 (2011) (describing Neighborhood Progress, Inc. as a Cleveland-based "multidisciplinary program that provides detailed property information, financial assistance, and legal services to a set of high-performing, neighborhood-based nonprofit development corporations").

33. See, e.g., Keri D. Brown, *Richard and Elizabeth Hussein: Making a Difference in More Ways than One*, 49 HOUS. LAW. 12, 12 (2012) ("Many . . . know Catholic Charities for its work providing legal services to immigrants; however, the work of Catholic Charities is much broader and encompasses many program areas, such as adoption assistance, assistance to senior citizens, housing assistance, disaster assistance and an AIDS ministry.").

34. Our research efforts have uncovered no such example of discipline.

individuals who received the financial help, any worries about Rule 1.8(e) should be eliminated.

II. ISSUE # 2: FINANCING OUT (FEES AND MOVEMENT GROUPS)

This example connects to the original story. The litigation filed by CJF ensues for several years, and ultimately CJF prevails and obtains an award of attorneys' fees. MigrantsCA has spent hundreds of hours on organizing, educating, and supporting the litigation, and its work has made a significant difference in the progress of the case. It is a fact that the litigation could not have been undertaken without the work of MigrantsCA.

MigrantsCA has many significant projects beyond supporting this litigation, and its funds are very tight. Its fundraising efforts have been robust, but it is difficult to raise sufficient support for its work. CJF would like to donate a significant portion of the fee award to MigrantsCA. May it do so?

Ethical and Strategic Assessment of Issue #2

The legal ethics question presented by this second example is whether lawyers or law firms may share fees with nonlawyers. The basic rule is no: "A lawyer or law firm shall not share legal fees with a nonlawyer," according to Rule 5.4.³⁵ The concern here is about the independence of lawyers. The ban is "directed mainly against entrepreneurial relationships with nonlawyers and primarily [is] for the purpose of protecting a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers."³⁶

But Rule 5.4 includes several exceptions, and one of those applies directly to the CJF/MigrantsCA relationship. Rule 5.4(a)(4) states that "a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter."³⁷ The ABA added that exception to implement the sentiment of ABA Formal Opinion 93-374, which reached the same conclusion by reasoning that when a nonprofit organization is involved, there is less of

35. MODEL RULES OF PROF'L CONDUCT r. 5.4(a) (AM. BAR ASS'N 2018).

36. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-423 (2001).

37. MODEL RULES OF PROF'L CONDUCT r. 5.4(a)(4). Some jurisdictions, including the District of Columbia, Massachusetts, and South Dakota, further limit the "nonprofit organization" recipients to those with federal tax-exempt status. See AM. BAR ASS'N, *Variations of the ABA Model Rules of Professional Conduct*, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html (last visited Nov. 10, 2018) (illustrating jurisdictional rules comparison charts).

a threat to the lawyer's independent judgment than when a for-profit arrangement is in place.³⁸

The challenge for many movement lawyers, however, is that more than a dozen states have adopted a version of Rule 5.4(a) that fails to include the safety net provided by Rule 5.4(a)(4).³⁹ Without that explicit exception, a law firm like CJF risks noncompliance with the otherwise-well-established principle that a lawyer may not share fees with a nonlawyer.⁴⁰ Not only is it a disciplinary violation to engage in such fee sharing, but in some jurisdictions doing so constitutes a criminal offense for both the lawyer and the nonlawyer.⁴¹ There appear to be credible First Amendment challenges to enforcement of that ban when the sharing of legal fees is with a public interest organization.⁴² Those sophisticated constitutional arguments are beyond the scope of this Article.

For lawyers operating in a jurisdiction that does provide the Model Rule 5.4(a)(4) safe harbor, one additional scenario warrants our consideration. We concluded just above that Rule 5.4(a)(4) expressly permits a law firm's sharing of court-awarded legal fees with "a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter."⁴³ That language might imply that the law firm may *not* donate some amount of its general funds to a community organization or non-governmental organization ("NGO"), funds that were generated via legal fees paid by clients, if those funds were not "court-awarded" and the NGO did not employ, retain, or recommend the firm. Would a donation by a law firm such as Durkin Gibson to an activist organization like MigrantsCA amount to unlawful fee sharing, even in the more liberal jurisdictions?

The answer to that question must be no, but confident support for that answer is surprisingly elusive. Law firms make donations to charities all the time, of course. While a charitable donation to a legal

38. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374 (1993); *see also* ANNOTATED MODEL RULES OF PROF'L CONDUCT, § 5.4(a) (2018) (discussing that opinion and its reasoning).

39. *See Variations of the ABA Model Rules of Professional Conduct, supra* note 37 (listing Alabama, Connecticut, Georgia, Indiana, Iowa, Kentucky, Mississippi, New York, Texas, Utah, Virginia, Washington, and Wyoming as states without Rule 5.4(a)(4) or an equivalent provision).

40. *See, e.g.,* NYBSA Comm. on Prof'l Ethics, Op. 906 (2012) (confirming that in New York a division of fees allowed by Rule 5.4(a)(4) would subject a lawyer to discipline).

41. *See, e.g.,* N.Y. JUD. LAW § 491 (McKinney 2018) (misdemeanor "to divide" lawyers' fees with a nonlawyer or to "receive" such fees).

42. *See* Op. 906, *supra* note 40 (noting that possibility); Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1126-32 (1989) (developing the First Amendment arguments).

43. MODEL RULES OF PROF'L CONDUCT r. 5.4(a)(4).

services organization (as much of law firm philanthropy will be) arguably would satisfy Rule 5.4 because the legal fees, if they are considered “shared” at all, are shared with lawyers, not with nonlawyers,⁴⁴ lawyers and law firms also provide charitable contributions to non-legal nonprofits.⁴⁵ Some ethics opinions have confirmed that such bequests will not contravene Rule 5.4, while acknowledging that the rule might literally appear to prohibit such philanthropy. An Arizona ethics opinion captured the appropriate sentiment in elegant fashion:

If [Arizona’s Rule] 5.4(a) were interpreted literally and taken to its most ludicrous extreme, it would mean that lawyers cannot donate any of their income to charities because it would be “sharing” a fee with a nonlawyer. Thus, lawyers who derive their income from fees never can donate money. This interpretation of [Rule] 5.4 not only is beyond the intended purposes of the Rule, but is against public policy.⁴⁶

The Philadelphia Bar Association’s ethics committee arrived at a similar conclusion.⁴⁷ Some older ethics opinions, however, have disagreed and deemed charitable contributions as effecting impermissible fee sharing.⁴⁸ Given how prevalent and public law firm philanthropy is today,⁴⁹ we may confidently conclude that the older opinions are outdated and are no longer a concern for attorneys in 2018. A firm such as Durkin Gibson may safely support an organization like MigrantsCA without a worry about having shared fees with nonlawyers in violation of Rule 5.4.

III. ISSUE # 3: COALITION WORK AND WORKING WITH TRADITIONAL LAWYERS

This example arises in a different context. Here, you and your three-person progressive law firm have worked over the past five years

44. While the recipient legal services organization may use the gift to pay for its non-professional staff, Rule 5.4 makes clear that paying staff compensation is not impermissible sharing with nonlawyers. *See id.* at r. 5.4(a)(3).

45. *See, e.g.,* Melissa Maleske, *The 10 Most Charitable Law Firms*, LAW360 (Sept. 29, 2015, 8:36 PM EDT), <https://www.law360.com/articles/708577/the-10-most-charitable-law-firms> (describing law firm support for education and entrepreneurship initiatives, among others).

46. Ariz. Comm. on the Rules of Prof’l Conduct, Formal Op. 94-14 (1994).

47. Phila. Bar Ass. on Prof’l Guidance Comm., Formal Op. 91-34 (1991).

48. Ethics opinions from the Iowa State Bar Association and the State Bar of Nevada have concluded that lawyers’ contributions to charities would be impermissible fee-sharing with nonlawyers. St. Bar of Nev. Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 5 (1987); Iowa State Bar Ass’n Comm. on Prof’l Ethics and Conduct, Formal Op. 84-7 (1985); *see also* Ill. Bar Ass’n, Informal Op. 92-24 (1993) (opinion later withdrawn).

49. *See* Maleske, *supra* note 45.

as counsel for the Housing Opportunities Collective (“HOC”), a grassroots community-based organization dedicated to making affordable housing more available to low-income residents and especially to those in immigrant communities. HOC now serves as a lead plaintiff in a national, federal class-action lawsuit challenging new regulations issued by the United States Department of Housing and Urban Development (“HUD”) that would privatize many public housing developments and raise the rent rates for those residents. In the class action litigation, HOC is represented by a large, well-funded national nonprofit advocacy organization, the Project for a Just Democracy (“PJD”). You are co-counsel to PJD in the class action, but with a less central role.

As part of its litigation and negotiation strategy, PJD convened a meeting of many housing advocacy groups to develop evidence and to refine tactics. The HOC leaders, who know the affordable housing field much better than the PJD lawyers, felt isolated and disrespected in that process. They also see the PJD lawyers as making strategic and tactical decisions from the top down, rather than the bottom up, with very little input from the those who work in the neighborhoods and on the ground. The PJD lawyers have not included HOC in their deliberations except in a perfunctory way. In addition to that deep concern, the HOC representatives fear that PJD will serve as the media face of the campaign against HUD and take credit that belongs to HOC. HOC relies on its good and visible reputation for funding and credibility, so the PJD actions in monopolizing the public relations hurts HOC.

The HOC representatives have shared these concerns with you. Their conclusion is that HOC should retain better lawyers—lawyers who will be more accountable to and respectful of the expertise and the experience of the community organization clients. May you counsel HOC about that option? May you recommend it? And, if replacing PJD is not a viable resolution or does not happen for some reason, how should you work with the PJD counsel?

Ethical and Strategic Assessment of Issue #3

The tensions described in Issue #3 are not uncommon within coalition work among movement lawyers. They present complex strategic questions for the community organizers and the grassroots organizations. The legal ethics issues, though, are less challenging (a fact that does little to ease the larger complexities present here). We may separate out the inquiries into two parts: (1) the ethics of counseling a

client about its relationship with separate counsel, and (2) the ethics of working with co-counsel with whom the lawyer disagrees.

A. The Counseling Responsibilities

The first two questions ask whether you, as counsel to HOC and co-counsel of record in the class action litigation, may counsel your client, including offering recommendations about what would be the best way to proceed, regarding the client's desire to find more responsive lawyers. The answer is yes. The substance of the resulting conversation could be tricky, but the lawyer's right to have the conversation is clear. Indeed, if it fits within the subject matter for which you were retained, you *must* engage in this counseling.

No considerations of confidentiality or loyalty prohibit a lawyer from discussing with her client the client's relationship with co-counsel. The only conceivable professional rule that might seem applicable is Rule 4.2, which states that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."⁵⁰ HOC is a represented "person," so the rule seems to apply if read literally. If you were not representing HOC on the same matter as PJD as co-counsel, Rule 4.2 *might* be read to preclude you from discussing the class action with HOC, although that is not the best read of the rule. Rule 4.2 expressly permits a represented person to consult with another lawyer about the same matter, often to solicit a second opinion.⁵¹ So nothing precludes you from discussing the entire matter, including the role of co-counsel, with your client.

Depending on your attorney-client relationship with HOC, you may have more than just permission, but instead an obligation, to address the issue with your client. It is a fundamental principle of representation that a lawyer must address legal issues that affect a client, even if the client has not raised the issues, if the retainer agreement includes the subject-matter.⁵² If there were options available to HOC that might address its

50. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2018).

51. Comment 4 states that the rule does not "preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter." *Id.* r. 4.2 cmt. 4. That language covers the second opinion context. See Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 323-24 (2003).

52. "One of an attorney's basic functions is to advise. Liability can exist because the attorney failed to provide advice." *Nichols v. Keller*, 19 Cal. Rptr. 2d 601, 608 (Ct. App. 1993). As another court described the duty: "A lawyer has an obligation to explain the problem, lay out the significant

concerns, and you failed to inform the client about those options, you may have breached an important duty.⁵³

The larger strategic complication for you in this setting is what, if anything, HOC may do if it is dissatisfied with PJD's performance as lead counsel in the class action. In most (if not all) class actions, the court appoints lead counsel, or "general counsel," to oversee the management of the litigation, even if other lawyers serve as counsel of record.⁵⁴ The appointment of a law firm to lead counsel status by the court is typically very competitive.⁵⁵ The lawyers appointed as lead counsel do not owe any specific or enforceable duty of loyalty to any individual client, but instead must act on the broader interests of the class.⁵⁶ Even lead plaintiffs may be replaced if their interests no longer coincide with those of the larger class⁵⁷ and at times will oppose a class settlement proposed by lead (i.e., "their") counsel, if the settlement does not suit their own individual interests.⁵⁸

Therefore, while PJD has a duty to respect its client—the class of affected tenants and prospective tenants—and must rely on the class rather than its own interests in its strategic decision making,⁵⁹ it is not

choices, and help the client make an informed, rational decision." *In re Wolfram*, 847 P.2d 94, 101 (Ariz. 1993) (en banc).

53. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (AM. LAW INST. 2000).

54. See, e.g., FED. R. CIV. P. 23 (g)(1)(A) (listing factors federal judges use in appointing counsel); *MacAlister v. Guterma*, 263 F.2d 65, 68 (2d Cir. 1958) (explaining function of "general counsel" as "to supervise and coordinate the conduct of plaintiffs' cases"); see also Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 654-57 (2002).

55. See generally S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391 (2013).

56. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 187 (2d Cir. 1987) (noting that "[a] plaintiff who joins in a class action . . . gives up his or her right to control the litigation in return for the economies of scale available under" the class action rules).

57. See FED. R. CIV. P. 23 (c)(1)(B).

58. See *Kloster v. McColl (In re BankAmerica Corp. Sec. Litig.)*, 350 F.3d 747, 752 (8th Cir. 2003) (approving settlement over objections of three members of one lead plaintiff group in class action involving four plaintiff classes); *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978) ("[W]hen a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs.").

59. Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145-55 (2001) (criticizing the role of class action counsel for their inattention to client interests); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1179-212 (1995) (reviewing the reliability of class settlements); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, U. CHI. LEGAL F., 2003, at 583-97 (2003) (addressing class conflicts); Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1482-503 (2003) (exploring conflicts within class actions).

readily apparent that HOC may simply replace PJD with new counsel in the same fashion to which a non-class client has a nearly unfettered right.⁶⁰ The best HOC could do, most likely, would be to prepare, with other counsel, a petition to the court advocating for the replacement of PJD with more responsive class counsel.

*B. The Ethics and Strategy of Working with Co-Counsel
with Whom the Lawyer Disagrees*

The issue of disagreement among lawyers working for a shared client, or coordinating for clients with related issues, is not new, of course. “[C]o-counsel and referral relationships between lawyers in different firms are so common and widespread that controversies are inevitable, whether linked to tactical disagreements, errors or misjudgments by one of the participants, client-centered disputes, or fights over fees.”⁶¹ But, as Professor Douglas Richmond reports, little has been written about the precise contours of the collaborative relationships.⁶²

A few general observations might help. If you are co-counsel to the class along with PJD, then you both assume joint and several responsibility for the management—or mismanagement—of the litigation. Co-counsel are treated as joint venturers, who share responsibilities just as partners do.⁶³ But if the roles of the lawyers are expressly distinct without overlap of duties and that arrangement is clear from the respective retainer agreements, then it is possible to avoid the joint and several liability exposure.⁶⁴ Co-counsel are expected to share information, and their shared discussions are presumptively covered by attorney-client privilege.⁶⁵

If the litigation strategy developed by PJD is substantively ineffective, you arguably have a duty to intervene, and to prevent

60. See MODEL RULES OF PROF'L CONDUCT r. 1.16 & cmt. 4 (AM. BAR ASS'N 2018) (“A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s services.”); Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. 98, 103 (2015) (“[T]here is little doubt that the client’s right to hire and fire a lawyer is almost absolute.”).

61. Douglas R. Richmond, *Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle?*, 98 KY. L.J. 461, 462 (2010).

62. *Id.* For one more recent effort, see generally Stephen C. Sieberson, *Two Lawyers, One Client, and the Duty to Communicate: A Gap in Rules 1.2 and 1.4*, 11 U.N.H. L. REV. 27 (2013).

63. *Duggins v. Guardianship of Washington*, 632 So.2d 420, 427-28 (Miss. 1993); Richmond, *supra* note 61, at 487-95.

64. Richmond, *supra* note 61, at 495.

65. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (AM. LAW INST. 2000) (defining “privileged persons” for purpose of the attorney-client privilege as including the client’s lawyers).

malpractice.⁶⁶ But if PJD's interactions with the community-based organizations are substantively acceptable by professional liability standards, but still disrespectful to the affected community groups, your responsibilities are less clear. While progressive lawyers and scholars treat fealty to community as essential to good practice,⁶⁷ it is not abundantly clear that failure to achieve that goal constitutes a breach of the lawyer's duty of care.⁶⁸ Even if not the basis for formal professional misconduct or discipline, though, PJD's disrespect of HOC and its community connections is unacceptable and ought to be addressed. Much will turn, of course, on the relationship within the class action litigation between you and PJD, the lead counsel for the plaintiff class. The education of PJD about its duties to the community will likely take the form of a subtle negotiation, and the best negotiation teachers persuade us that a principled, interest-focused approach will be more effective than an aggressive, competitive stance.⁶⁹

66. Sieberson, *supra* note 62, at 61-63 (discussing *Curb Records v. Adams & Reese L.L.P.*, 203 F.3d 828 (5th Cir. 1999)).

67. The commitment of movement lawyers, and progressive lawyers generally, to deep respect for community input is well-established. See, e.g., Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374, 1439-40 (2017); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1495-96 (2017); Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 494-95 (2018); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2773-76 (2014).

68. Cf. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (in its requirement that a lawyer honor a client's strategic choices, "the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation"); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1652-53 (1997) (noting the deference allowed for counsel's strategic judgments, especially in public interest litigation).

69. See generally, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Carrie Menkel-Meadow, *The Evolving Complexity of Dispute Resolution Ethics*, 30 GEO. J. LEGAL ETHICS 389 (2017); Jayashri Srikantiah & Janet Martinez, *Applying Negotiations Pedagogy to Clinical Teaching: Tools for Institutional Client Representation in Law School Clinics*, 21 CLINICAL L. REV. 283 (2014).
